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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DONALD LORRIN CRONN,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

DOES A FEDERAL CRIMINAL DEFENDANT, WHO IS A WHITE MALE, HAVE STANDING TO CHALLENGE THE PURPOSEFUL DISCRIMINATORY EXCLUSION OF BLACKS, WOMEN AND HISPANICS FROM THE POSITION OF GRAND JURY FOREMAN?

II.

IS INVIDIOUS DISCRIMINATION IN THE SELECTION OF FEDERAL GRAND JURY FOREMEN A SIGNIFICANT VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRING DISMISSAL OF AN INDICTMENT?

TABLE OF CONTENTS

	Page
1. TABLE OF AUTHORITIES	ii
2. ADDRESS TO THE COURT	1
3. DECISIONS BELOW	2
4. JURISDICTION	2
5. CONSTITUTIONAL PROVISIONS AND RULES INVOLVED	3
6. STATEMENT OF THE CASE	4
7. REASONS FOR REVIEW	
I. STANDING	8
II. CONSTITUTIONAL SIGNIFICANCE OF FEDERAL GRAND JURY FOREMEN	14
8. CONCLUSION	21
9. APPENDIX	1-A

TABLE OF AUTHORITIES

CASES

Guice v. Fortenberry,
661 F.2d 496 (5th Cir. 1981)....18

Peters v. Kiff, 407 U.S 6,7,8,9,
493 (1972).....11,12,13,14

Rose v. Mitchell, 17,18
443 U.S. 545 (1979).....19,20

United States v. Abell,
552 F.Supp. 316
D. Me. 1982).....10,17

United States v. Breland,
522 F.Supp. 468
(N.D. Ga. 1981).....10,17

United States v. Carbrera-
Sarmiento, 533 F.Supp. 799,
(S.D. Fla. 1982).....10

United States v. Coletta,
682 F.2d 820 (9th Cir.
1982).....10,16

United States v. Cronn,
___F.2d___ (5th Cir., Sept.
28, 1983).....2

United States v. Cronn,
559 F. Supp. 124
(N.D. Tex. 1982).....2,5

United States v. Cross,
708 F.2d 631 (11th Cir. 1983)...9,15,18,19

United States v. Hobby,
702 F.2d 466
(4th Cir. 1983).....9,15,18

United States v. Holman,
680 F.2d 1340 (11th Cir.
1983).....9

United States v. Holman,
510 F.Supp. 1175
(N.D. Fla. 1981).....20

United States v. Jenison,
485 F.Supp. 655
(S.D. Fla. 1979).....10,11,17,20

United States v. Layton,
519 F.Supp. 946 (N.D.
Cal. 1981).....10,11,17

United States v. Manbeck,
514 F.Supp. 141
(D.S.C. 1981).....11,17

United States v. Musto,
540 F. Supp. 346
(D.N.J. 1982).....10,17

United States v. Perez-
Hernandez, 672 F.2d 1380
(11th Cir. 1982).....9,15

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V. 3,5,11,12
.....13,16

18 U.S.C. §371.....4

18 U.S.C. §1341.....4

18 U.S.C. §1343.....4

28 U.S.C. §1254(1).....3

Fed. R. App. P.,
Rule 41(b).....3

Fed. R. Crim. P.,
Rule 6(c).....3,4

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TO THE HONORABLE COURT:

COMES NOW the Petitioner, DONALD LORRIN CRONN, who petitions this Honorable Court to issue a writ of certiorari to review the judgment of the

United States Court of Appeals for the Fifth Circuit and would show the Court as follows:

DECISIONS BELOW

The opinion in this case by the United States Court of Appeals for the Fifth Circuit is found in United States v. Cronn, ___F.2d___ (5th Cir., Sept. 28, 1983) (not yet reported). The district court opinion is reported in United States v. Cronn, 559 F. Supp. 124 (N.D. Tex. 1982). Both opinions and the judgment are included in the attached Appendix (hereinafter App.).

JURISDICTION

On September 28, 1983, the United States Court of Appeals for the Fifth Circuit issued a judgment of affirmance in this case. (App., p. 39-A) Peti-

tioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on October 27, 1983, and Petitioner's motion for a stay of the mandate was granted by the court of appeals until November 26, 1983, pursuant to Fed. R. App. P., Rule 41(b). (App., pp. 41-A - 45-A.) The jurisdiction of this Court to review the judgment of the Fifth Circuit is provided by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

(A) U.S. Const. amend. V provides in pertinent part:

> No person shall...be deprived of life, liberty, or property, without due process of law....

(B) Fed. R. Crim. P., Rule 6(c) provides:

> Foreman and Deputy Foreman. The Court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

STATEMENT OF THE CASE

Petitioner was convicted in the District Court for the Northern District of Texas on one count of conspiracy (18 U.S.C. §371), three counts of wire fraud (18 U.S.C. §1343) and four counts of mail fraud (18 U.S.C. §1341). Prior to trial he moved to have his indictment dismissed

because of the discriminatory selection of grand jury foremen. In that motion Petitioner alleged that blacks, women and Hispanics were systematically and discriminatorily excluded from the office of grand jury foreman in the Northern District of Texas, which exclusion violated the Due Process Clause of the Fifth Amendment. To support these allegations, Petitioner also moved to inspect the grand jury selection records which would provide evidence as to the race and gender of grand jury foremen for use in establishing a prima facie case of discriminatory selection.

In an opinion issued August 4, 1983, the district court denied Petitioner's motion to inspect the grand jury selection records. United States v. Cronn, 559 F.

Supp. 124 (N.D. Tex. 1982). (App., p. 29-A.) The court reasoned that Petitioner was entitled to inspect the records only if any demonstrated discrimination in selecting the grand jury foreman would require dismissal of the indictment. Initially, the district court held that pursuant to Peters v. Kiff, 407 U.S. 493 (1972), Petitioner had standing to challenge the discriminatory exclusion of minority groups from the position of grand jury foreman although Petitioner was a white male. However, the court then found that discriminatory selection of federal grand jury foremen was constitutionally insignificant, and even if proven, such discrimination would not warrant the dismissal of Petitioner's indictment.

Following Petitioner's conviction, he appealed to the United States Court of Appeals for the Fifth Circuit raising, among other issues, the incorrectness of the district court's ruling on the constitutional significance of the federal foreman. The Government joined issue on the question of significance, and the case was orally argued. Neither in the district court nor on appeal did the Government challenge Petitioner's standing to make this attack. Furthermore, when the question of standing was raised by the district court at a pre-trial hearing, Petitioner explicitly relied upon Peters v. Kiff, 407 U.S. 493 (1972) as the basis for his claims. (App., pp. 46-A - 47-A.) Despite these facts, a panel of the Fifth Circuit on September 28, 1983, held that

Petitioner had not relied upon Peters, but rather had made an equal protection claim for which he did not have standing. (App., p. 1.) Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied by the Fifth Circuit on October 27, 1983. (App., p. 41-A.) It is this adverse judgment of which Petitioner seeks review by this Court.

REASONS FOR REVIEW

I.

STANDING

The issue of whether a white male has standing to seek dismissal of his indictment on the basis of discriminatory exclusion of minorities from the office of grand jury foreman has caused a significant split among the federal courts of appeals. The holding by the Fifth Circuit

below that Peters v. Kiff, 407 U.S. 493 (1972), did not provide standing for Petitioner's attack on the unconstitutional selection of federal grand jury foremen is in direct conflict with decisions by the Eleventh Circuit in United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982), United States v. Holman, 680 F.2d 1340 (11th Cir. 1983), and United States v. Cross, 708 F.2d 631 (11th Cir. 1983). The Fifth Circuit recognized that it was creating such a split in the Circuits. (App., p. 9-A.) The decision below also implicitly conflicts with the Fourth Circuit's opinion in United States v. Hobby, 702 F.2d 466 (1983), cert. pending, wherein that court decided the merits of the attack by the appellants, who were male, on the

exclusion of women from the foreman's position. The decision in United States v. Coletta, 682 F.2d 820 (9th Cir. 1982), in harmony with the decision herein by the Fifth Circuit, adds to the conflict which now involves differing opinions in four circuits. This conflict should be resolved.

The issue of standing in this kind of case is an important one which should be settled by this Court. Attacks on the discriminatory selection of grand jury foremen have often been made in the courts below. See, e.g., United States v. Abell, 552 F.Supp. 316 (D. Me. 1982); United States v. Musto, 540 F. Supp. 346 (D.N.J. 1982); United States v. Carbrera-Sarmiento, 533 F.Supp. 799, (S.D. Fla. 1982); United States v. Breland, 522

F.Supp. 468 (N.D. Ga. 1981); United States v. Layton, 519 F. Supp. 946 (N.D. Cal. 1981); United States v. Manbeck, 514 F.Supp. 141 (D.S.C. 1981); United States v. Jenison, 485 F.Supp. 655 (S.D. Fla. 1979). It is likely that such challenges will continue. Because of the uncertainty in the application of the Peters v. Kiff doctrine, standing will be a major stumbling block unless resolved by this Court.

The decision in Petitioner's case by the Fifth Circuit takes too narrow a view of the standing allowed by Peters v. Kiff. Petitioner's factual allegations, if proven, clearly demonstrated arbitrary exclusion of women, blacks and Hispanics from the position of grand jury foreman in violation of the Due Process Clause of the

Fifth Amendment. The court below held that the failure to denominate the attack as a "due process" violation of the Due Process Clause took Petitioner outside the coverage of Peters even though Petitioner relied upon Peters as the basis for standing the only time such a question was raised. (App., pp. 46-A - 47-A.) To hold that Petitioner should be denied standing where the facts he alleges otherwise show a violation of the Fifth Amendment disregards the reasons for the decision in Peters. There, in the opinion by Justice Marshall it was stated:

> In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for

> challenging the jury to too many defendants, rather than giving it to too few.

Peters, 407 U.S. at 504 (footnote omitted). Similar policy considerations were involved in Justice White's opinion in Peters, which was based upon statutory grounds. Id. at 506-07.

The rigid compartmentalization of Petitioner's claim as only an "equal protection" claim for which he supposedly lacked standing, even though alleged as a violation of the Fifth Amendment's Due Process Clause, calls into question the proper scope of standing under Peters, and also whether standing should have been dispensed in such a niggardly manner as it was in the court below. The courts of appeals have struggled with this question, reaching conflicting results. In order to

resolve this conflict and set out the limits on standing pursuant to Peters v. Kiff, this court should grant Petitioner's request for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

II.

CONSTITUTIONAL SIGNIFICANCE OF FEDERAL GRAND JURY FOREMEN

The issue briefed and argued by both parties in the court of appeals below, but not addressed because of its standing decision, was whether the district court erred in holding that discrimination in selecting grand jury foremen was constitutionally insignificant. Because it was insignificant, the district court reasoned, Petitioner's indictment could not be dismissed even if such discrimina-

tion were conclusively proven. (App., p. 38-A.) Assuming the opinion below on standing was wrong, the district court's ruling on the constitutional significance of the federal foreman must be addressed.

The significance question, like the standing question, has caused a direct split in the circuits. The Eleventh Circuit has consistently held that systematic exclusion of groups from the position of grand jury foreman is constitutionally important. See, United States v. Cross, 708 F.2d 631 (11th Cir. 1983); United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982). In contrast the Fourth Circuit has held in United States v. Hobby, 702 F.2d 466 (4th Cir. 1983), cert. pending, that the federal grand jury foreman's duties are only ministerial, and

thus, discriminatory selection of the foreman does not affect the rights of criminal defendants. Hobby is currently pending a decision in this Court on a petition for certiorari raising this question of significance. In addition, the Ninth Circuit's decision in United States v. Coletta, 682 F.2d 820 (9th Cir. 1982) also conflicts with the Eleventh Circuit decisions in holding that discriminatory selection of federal foremen does not have such a significant unfair impact so as to violate the due process requirements of the Fifth Amendment. This uncertainty concerning a defendant's rights against discrimination in the federal jury system should be eliminated by review of the problem by this Court.

Like the standing question, the significance question has also been the source of substantial litigation in the district courts. See, e.g., United States v. Abell, 552 F.Supp. 316 (D.Me. 1982); United States v. Musto, 540 F.Supp. 346 (D.N.J. 1982); United States v. Carbrera-Sarmiento, 533 F.Supp. 799 (S.D. Fla. 1982); United States v. Breland, 522 F.Supp. 468 (N.D. Ga. 1981); United States v. Layton, 519 F.Supp. 946 (N.D. Cal. 1981); United States v. Manbeck, 514 F.Supp. 141 (D.S.C. 1981); United States v. Jenison, 485 F.Supp. 655 (S.D. Fla. 1979). These cases illustrate the recurrent nature of the problem of discriminatory grand jury foreman selection and the proper remedy for such discrimination.

Rose v. Mitchell, 443 U.S. 545 (1979) provided the main basis for these attacks. In Rose, this Court assumed, without holding, that the discriminatory selection of the Tennessee grand jury foreman required dismissal of the indictment. This assumption was adopted as law in Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981)(en banc) which involved Louisiana grand jury foremen. Some courts, most notably the Fourth circuit in United States v. Hobby, 702 F.2d 466 (4th Cir. 1983), have held that discrimination involving federal grand jury foremen is insignificant because he does not have as much power as the state foreman in Rose and Guice.

The Eleventh Circuit has rejected this distinction, and in United States v.

Cross, 708 F.2d 631 (11th Cir. 1983), provided a well-reasoned analysis of the foreman significance issue. That court found that discriminatory selection of federal grand jury foremen struck at the same values recognized in Rose v. Mitchell, 443 U.S. 545, 556 (1979), that is the integrity of the judicial process and the basic concepts of a democratic society. Three reasons were given by the court in Cross to support the conclusion that this type of discrimination is significant enough to require dismissal of a federal indictment. First, as a matter of law, the federal foreman has many duties and responsibilities, for example, contact with the district judge and the United States Attorney, temporary excusal of grand jurors, and consultation regarding

contempt proceedings against recalcitrant witnesses. These duties are of such an extent and nature to render the foreman's position important. This importance is also demonstrated by judges who seek out persons who have strong leadership qualities, educational backgrounds, occupational experience and management ability for selection as foreman. See, United States v. Holman, 510 F.Supp. 1175, 1180 (N.D. Fla. 1981); United States v. Jenison, 485 F. Supp. at 665-66. The second supporting reason noted by the court of appeals was that appointment as foreman could endow a person with enhanced influence in decision-making. Third, it was unseemly to allow challenges to the discriminatory selection of state grand

jury foremen while ignoring the same type of discrimination in the federal system.

In Rose v. Mitchell and the many cases that preceded it, this Court has consistently recognized the insidious nature of discrimination and has required that convictions be set aside even though there was no showing of harm to a particular defendant. The application of this policy to foreman discrimination has split the courts of appeals and raised doubt as to the remedies available for such discrimination. Because this is an issue involving considerable litigation, and as in other discrimination cases, is one of importance to society, this Court should grant a petition for writ of certiorari to review the ruling below by the district court that discriminatory selection of

federal grand jury foremen is insignificant.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner, DONALD LORRIN CRONN, prays that this Court grant his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

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United States of America,
Plaintiff-Appellee,

v.

Donald Lorrin Cronn,
Defendant-Appellant.

No. 82-1614.

United States Court of Appeals,
Fifth Circuit.

Sept. 28, 1983.

Before CLARK, Chief Judge, GEE and POLITZ, Circuit Judges.

GEE, Circuit Judge:

Today's issue of significance is whether a criminal conviction in an otherwise fair trial [1] must be reversed on a ground far removed from guilt or innocence of the accused.* Defendant Cronn, an Anglo male, asserts that his

[1]We so conclude as to Cronn's other points for reversal, discussed below with the brevity that they merit.

*In accordance with Court policy, this opinion, being one which initiates conflict with the rule declared in another circuit, was circulated

conviction of mail fraud and related offenses must be overturned because females and members of racial minorities may have been underrepresented in tenure as grand jury foremen at the time of his indictment. This circumstance, which, in the posture of the appeal, we must assume existed, is said to have denied him his Fifth Amendment right to equal protection of the laws. No contention is made that the grand jury itself, from which the court selected a foreman, was improperly constituted.

The district court, 559 F.Supp. 124, denied Cronn's motion for access to grand jury selection records, thus aborting his

before release to the entire Court, and rehearing en banc was not voted by a majority of the judges in active service.

attempt to establish underrepresentation. Although the court concluded that despite his non-minority status Cronn possesses standing to raise the complaint, it determined as well that "the position of a federal grand jury foreman is not constitutionally significant." In so doing, it distinguished our decision in Guice v. Fortenberry, 661 F.2d 496 (5th Cir.1981) (en banc), and that of the Supreme Court in Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), both concerned with foremen of state grand juries, on two grounds: that the federal foreman was selected from among the members of the already-constituted (and properly so) grand jury, rather than added to them as in Rose and Guice; and that his powers, unlike the

greater ones of the state foremen, were merely ministerial. We affirm, but on a narrow and basic ground--one that allows us to leave decision of these broad and knotty issues for another day.[2]

From the presentation of the initial motion to the submission of the briefs and argument of the case before us, plaintiff has specifically denominated his claim as one arising under "the equal protection component of the Fifth Amendment to the United States Constitution." (App.Br. p. 7). In none of his briefs to this court is any other due process contention made. Nor was any made in his district court filings or discussed in the opinion of that court. Indeed, the only time the words "due process" appear

[2] A conflict already exists within the circuits about whether the position of federal foreman is constitutionally significant. Compare United States v. Hobby, 702 F.2d 466 (4th

in any brief filed with us by Cronn is in an observation that, as in the case of a state defendant relying on the explicit Equal Protection Clause of the Fourteenth Amendment, "[t]his equal protection attack is also available to federal defendants through the Due Process Clause of the Fifth Amendment." (App.Br. p. 7).

It is therefore plain that Cronn has elected, for whatever reasons, to advance no broader or additional due process challenge and to rely solely on the equal protection component. Based on the analysis below we determine that, for purposes of standing, challenges based on equal protection and due process analyses

Footnote 2 continued:
Cir.1983) (not so), with United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir.1982), and United States v. Cross, 708 F.2d 631 (11th Cir.1983) (significant).

are distinct. Because Cronn has raised only an equal protection challenge, it is in this context alone that we review his standing. We cannot and will not consider a contention presented neither to the trial court nor to us. [3]

The district court, however, failed to distinguish between due process and equal protection challenges to grand jury composition, and held that this plaintiff had standing. In so doing, the court relied upon a recent case in the Eleventh Circuit. United States v. Perez-Hernandez, 672 F.2d 1380. We set out the reasoning of Perez in this issue in full:

> Before addressing the merits of appellant's case, we must first discuss a preliminary question of standing. Appellant is a male of hispanic descent who claims a denial of equal

[3] We note especially that we do not deal here with a motion for more definite statement, with an issue tried as

protection because blacks and women have been excluded from serving as grand jury foremen. Conflicting language in several recent Supreme Court cases has clouded his right to assert this claim. In Peters v. Kiff, 407 U.S. [493] at 498, 92 S.Ct. [2163] at 2166 [33 L.Ed.2d 83], the opinion of the Court discussed this question in an equal protection context and concluded that "when a grand or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim." Three years later, the Court reaffirmed this holding, although in the context of a Sixth Amendment claim. Taylor v. Louisiana, 419 U.S. [522], 95 S.Ct. [692] at 695 [42 L.Ed.2d 690]. In 1977, however, the Court used significantly different language to address the same question: "thus, in order to show that an equal protection violation has occurred in the context of grand jury selections, the defendant must

Footnote 3 continued:
though pled, or with any other technical matter of pleading. Instead, we view a potential contention that was never advanced at all, neither "pled" nor "tried," either here or to the district court.

show that the procedure employed resulted in substantial under-representation of his race or of the identifiable group to which he belongs." Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977) (emphasis added). In Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), the opinion of the Court at first seems to support the holding in Peters v. Kiff: "[T]he Court has recognized that a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded." Rose v. Mitchell, 443 U.S. at 556, 99 S.Ct. at 3000. Later in the opinion, however, the troublesome language from Castaneda v. Partida is quoted with approval. Id. [430 U.S.] at 565, 99 S.Ct. at 3005. Despite this apparent conflict, we conclude that appellant is not precluded from bringing this claim even though he is not black or female. The holding in Peters v. Kiff is clear and unambigous and has never been expressly overruled. On the other hand, the disputed language in Castaneda v. Partida possibly refers only to the particular defendants involved in

> that case. Without more direction from the Supreme Court, we cannot hold otherwise.

672 F.2d at 1385-86 (footnotes omitted). Despite our customary deference to our sister circuit, we are unable to concur in this well-stated reasoning.

At the onset we conclude that Peters v. Kiff, insofar as it discusses the right of a white defendant not to have black citizens systematically excluded from his grand or petit jury, does not rest on constitutional equal protection grounds.[4] Since it does not, but rather on due process and in some instances Sixth Amendment ones, we do not see that "apparent conflict" which concerned the Perez court between it and the Rose and Castaneda holdings. We suggest with

[4] The Perez court represented that the Peters opinion "discussed" the question of a defendant's standing "in an equal protection context and concluded that 'when a grand or petit

Footnote 4 continued:
jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances of the person making the claim.'" Perez 672 F.2d at 1385-86 (citing Peters, 407 U.S. at 498, 92 S.Ct. at 2166). In this specific context, we believe the Perez court misunderstood the meaning of the Peters opinion. The language quoted by Perez means only that the "existence" of a "violation does not depend on the circumstances of the person making the claim. In the language following the Court explained, "[i]t is a different question, however, whether petitioner is entitled to the relief he seeks on the basis of that constitutional basis." This question--that of standing to object--was not analyzed in the equal protection context, but in the due process context.

Furthermore, we do not conclude so readily as did the Perez court that the Rose opinion "at first seems to support the holding in Peters v. Kiff," at least not as Peters is interpreted by the Perez court. The opinion in Rose does state, as the Perez court represents, that earlier Supreme Court decisions have "recognized that a criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group purposefully have been excluded." Yet, the court in Rose cited in support of this pro-

deference that Peters' due process analysis did not bear on Perez's equal protection claim. Nor do we see how Peters could figure in today's decision.

The plurality opinion in Peters [5] reviewed a claim brought by a white defendant that discrimination against blacks in the selection of his grand jury violated his consitutional rights under the due process and equal protection clause. The State in that case attacked plaintiff's standing, arguing that absent a specific showing of harm only a member of the discriminated-against minority

Footnote 4 continued:
position two cases, each of whcih upheld a black defendant's right to object to the exclusion of blacks from his grand jury. Limited as it should be to this proposition, it does not bear directly on the question before us or the court in Perez.

[5] The majority in Peters was made up of three Justices concurring in Justice Marshall's opinion and three joining Justice White's concurrence in the judgment. Only Justice Marshall's

could rest on the presumption that a grand jury so constituted would be prejudiced against him. The Supreme Court responded that this "argument takes too narrow a view of the kinds of harm that flow from discrimination in jury selection." 407 U.S. at 498, 92 S.Ct. at 2166. The Court noted that the exclusion of minorities from jury service "offends a number of related constitutional values." Id.

The Court first reviewed cases in which black defendants had presented equal protection challenges to the discriminatory exclusion of other blacks

Footnote 5 continued:
opinion rests on the right of a white defendant not to have black jurors systematically excluded from his juries. Justice White's concurrence rests on statutory grounds not urged here.

from their grand juries. In concluding its equal protection discussion, the Peters Court reasoned that "[b]ecause each of these three cases was amenable to decision on the narrow basis of an analysis of the Negro defendant's right to equal protection, the Court brought all three under that single analytical umbrella." Id. at 499, 92 S.Ct. at 2167 (emphasis added). But the defendant in Peters was white, and so the court proceeded to examine the standing of a white defendant under alternative constitutional values. The Court explained that because of its disposition of the case, it had not been necessary to consider defendant's claim that his own rights under the Equal Protection Clause had

been violated. Id. at 497 5, 92 S.Ct. at 2165 n. 5.[6]

The Court considered other specific constitutional values and their effect on the class of defendants having standing to object. It concluded that the exclusion of a discernible class from jury service would violate the right preserved by the Sixth Amendment to "a representative cross-section of the community." Id. at 500, 92 S.Ct. at 2167 (citing in Williams v. Florida, 399 U.S. 78, 100, 90 S. Ct. 1893), 1906, 26 L.Ed.2d 446 (1970). But the Sixth Amendment was not applicable in Peters; the Court instead based its decision entirely upon the due process analysis.

[6] Indeed, the dissent of the Chief Justice squarely so observes, without protest from Justice Marshall:

> While the opinion of Mr. Justice Marshall refrains from relying on the Equal Protection Clause, it

Starting with the premise that "[a] fair trial in a fair tribunal is a basic requirement of due process," the Court reasoned that an unconstitutionally composed grand jury violated the due process rights of all defendants. The Court relied upon an expanded view of standing in this context, because due process violations had previously been found absent a showing of actual bias. The likelihood or appearance of bias in the composition of the tribunal was sufficient to support a due process claim: "[i]llegal and unconstitutional jury selection procedures cast doubt on the

Footnote 6 continued:
concludes that if petitioner's allegations are true, he has been denied due process of law. 407 U.S. at 509, 92 S.Ct. at 2172.

integrity of the whole judicial process." Id. 407 U.S. at 502, 92 S.Ct. at 2168. It was only in the context of recognized due process values that the white defendant in Peters was granted standing.

We do not suggest that the election of the court in Peters to decide standing in that case under a due process rather than an equal protection analysis precludes a similar conclusion under equal protection. We hold only that because the Court did not reach the question of standing under the equal protection analysis in that case, we are compelled to do so today. As it bears on this question, we read Peters to stand for the proposition that objections to the composition of a grand jury under the equal protection and due process analyses are

distinct, and that the former is likely a more "narrow basis of analysis." Id. at 499 S.Ct. at 2167. [7]

Against this background, we decide the question based on a more recent Supreme Court decision analyzing the question of standing to object to grand jury selection specifically under the equal protection analysis. Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Cronn makes no complaint that the (numerical) minority of which he is a member--Anglo males--has been discriminated against in foreman selections. This is fatal to his equal protection contention. Writing in Rose, a case involving claimed discrimination in selection of grand jury foremen and

[7] That equal protection may be more narrowly drawn was also suggested by the Supreme Court in Bolling v. Sharpe:

squarely in point on this issue, the Supreme Court reiterated its earlier holding in Castaneda, quoting from that opinion:

> That is "in order to show that an equal protection violation has occurred in the context of grand jury [foreman] selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." Castaneda v. Partida, 430 U.S., at 494, 51 L.Ed.2d 498, 97 S.Ct. 1272 [at 1280].

Id. at 565, 99 S.Ct. at 3005 (emphasis added). We are not free either to disre-

> Footnote 7 continued:
> The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

347 U.S. 497, 74 S.Ct. 693, 694, 93 L.Ed. 884 (1954).

gard or to expand upon the express language of the Court, writing on the precise legal point at issue today, especially where it is the Court's last word on the subject and where the Court proceeded to evaluate the evidence in the case before it exactly in accord with its statement of the proof required.

Logic indicates that equal protection considerations are not involved in the claim of a white male not to have females and racial minorities excluded from the judicial process as it is applied to him. The essence of an equal protection claim is that other persons similarly situated as is the claimant unfairly enjoy benefits that he does not or escape burdens to which he is subjected. This sort of a contention on Cronn's behalf might be

stated, for example, in such terms as that his right to be tried by a petit jury containing members of his own ethnic group was infringed by the systematic exclusion of its members from venires. Stated or unstated, a claim that others similarly situated as he is--members of groups that are not so excluded from jury service--are unfairly favored over him in this regard is an essential component of such a claim. Equal protection claims are of their nature personal, to be stated in terms of one's own rights or those of a class in which one claims membership; logically, Cronn lacks standing to complain of unequal treatment accorded other persons or classes of which he is not a member.

So much for rigorous logic. We are aware that it has not always carried the day where standing to assert the constitutional rights of third persons is at issue. Especially in First Amendment questions involving freedom of expression, the Court has, for example, tended to examine the validity of a statute on its face--sometimes at the behest of persons to whom its unconstitutionality as applied is more unlikely. A noted commentator suggests that this tendency probably results from the threat that a broad statute may pose to free expression. C. Wright, The Law of Federal Courts 73 & n. 71 (1983) (and cases cited therein). But such challenges also have been entertained in other First Amendment contexts. Pierce

v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (parochial school successfully asserted rights of students and parents against statute requiring public education exclusively). Even in the area of equal protection such departures from the rule that one may not assert the rights of another are not unknown. Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149 (1917). There a white seller seeking specific performance of a real estate sales contract with a black purchaser was heard to assert that a city ordinance barring black persons from the area concerned was unconstitutional, and this over the assertion of the ordinance as a defense by the purchaser. These are, however, exceptional instances and

ones--except perhaps those regarding free expression--where the rights of the plaintiff derive from the same nexus and stand in a symbiotic relationship to those of the third party. Perhaps the rule to be deduced is that any part to a consensual and existing relationship that is regulated by statute will be allowed to assert the rights of the other. See Griswold v. Connecticut, 381 (1965) (physician furnishing contraceptives to patients); C. Wright, supra, at 73.

Nothing of this sort is presented by Cronn's equal protection contention. It is vintage jus tertii, and we conclude that the general rule against entertaining such equal protection claims should prevail. This seems, indeed, especially so where at all times during

this litigation the due process attack sanctioned by Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), lay ready to Cronn's hand but was not taken up.

Cronn advances two lesser points for reversal which merit brief discussion. The first complains of the trial court's refusal to deliver a tendered charge defining "reckless indifference" as used in a portion of the mail fraud charge on which he was convicted. The relevant portion of the charge reads as follows:

> A statement or representation is "false" or "fraudulent" within the meaning of this statute if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud.

During the charge conference appellant's counsel requested that the follow-

ing instruction be read to the jury to explain the meaning of making a representation with "reckless indifference" as to its truth and falsity:

> In this context "reckless indifference" means that a defendant must have actually been aware of a high probability that the statements were untrue, and he must have consciously disregarded that high probability.

The general rule in our Circuit as regards jury instruction is:

> The primary purpose of jury instructions is to define with substantial particularity the factual issues, and clearly instruct the jurors as to the principles of laws which they are to apply in deciding the factual issues involved in the case before them.

United States v. Gilbreath, 452 F.2d 992, 994 (5th Cir.1971). When called upon to review the adequacy of jury instructions, an appellate court must examine the instructions as a whole, rather than merely viewing the failure to give any

one instruction independently. United States v. Grote, 632 F.2d 387 (5th Cir.1980); United States v. Leal, 547 F.2d 1222 (5th Cir.1977). The proper standard of review, therefore, is "whether the court's charge as a whole was a correct statement of law." United States v. Arquelles, 594 F.2d 109, 112 n. 3 (5th Cir.1979).

Certainly, the instructions given are on their face "a correct statement of law." They were taken from a standard work. We conclude that in context as given and taken as a whole they fairly present the factual issues. The terms "reckless" and "indifference" either alone or in combination, carry their normal meaning in the context and are scarcely words of art. In order to con-

vict, the jury was required to find not only the presence of "reckless indifference" in the making of the statements in question, but that they were made with "intent to defraud." Though the definitions are fairly circular, they present the concept fairly.

The second point complains of the exclusion of the testimony of an expert witness, where the district court determined the proffered witness was not qualified. Trial courts exercise a wide discretion as to admission and exclusion of evidence and an unusually wide one as to the testimony of expert witnesses. Salem v. United States Lines Co., 370 U.S. 31, 35, 82 S.Ct. 1119, 1122, 8 L.Ed.2d 313 (1962); Perkins v. Volkswagen of America, Inc., 596 F.2d 681, 682 (5th

Cir.1979). We conclude that it was not exceeded here.

AFFIRMED.

United States of America,

v.

Donald Lorrin Cronn,

No. CR 3-82-071

United States District Court
N.D. Texas,
Dallas Division.

Aug. 4, 1982

MEMORANDUM OPINION AND ORDER

This case is presently before the Court on Defendant's motion to make available to the Defendant and his counsel the records of grand jury selection. Defendant wants to adduce evidence to support his motion to dismiss the indictment based on discriminatory selection of grand jury foremen. Defendant relies solely on the Fifth Amendment. If Defendant has a right to a dismissal of the indictment on the basis of discriminatory selection of grand jury foremen, it

follows that he has a right to have access to the records of grand jury selection. Therefore, the issue before the Court is whether Defendant would be entitled to a dismissal of the indictment, assuming an appropriate showing of discrimination in the selection of grand jury foremen and further assuming the government fails to rebut such showing.

I. STANDING

Defendant is a white male. He alleges that during the period from 1970 through 1982, members of constitutionally recognizable minority groups have been unconstitutionally precluded from service as grand jury foremen. The Fifth Circuit has never directly been faced with the issue of whether a non-minority has standing to assert an equal protection claim based on the underrepresentation of

minorities on a grand jury. Two district courts have denied standing in this situation based on the following language from Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977), quoted in Rose v. Mitchell, 443 U.S. 545, 565, 99 S.Ct. 2993, 3004, 61 L.Ed.2d 739 (1979): "Thus, in order to show that an equal protection violation has occurred in the context of grand jury selections, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." (emphasis added). However, this Court finds the reasoning in U.S. v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982) and U.S. v. Breland, 522 F.Supp. 468 (N.D. Ga. 1981) more persuasive on this point. These opinions

rely on Peter v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972) wherein the Supreme Court concluded the following:

> In light of the great potential for harm latent in an unconstitutional jury-selection system, and the strong interest of the criminal defendant in avoiding that harm, any doubt should be resolved in favor of giving the opportunity for challenging the jury to too many defendants, rather than giving it to too few.

As pointed out by the 11th Cir. in Perez-Hernandez, supra, at 1386 "[t]he holding in Peters v. Kiff is clear and unambiguous and has never been expressly overruled." Although the Castaneda and Rose opinions are more recent, in each case the defendant was in fact a member of a minority group. Thus, the issue of whether a non-minority in fact has standing to assert underrepresentation of minorities has not been directly reassessed

by the Supreme Court. Under the Supreme Court authority outlined above, I believe that a non-minority has standing to assert a challenge to the minority representation on a grand jury. However, because I conclude in Part II of this memorandum opinion that the duties of the grand jury foreman are ministerial and not of constitutional significance, it is not necessary to this ruling to determine standing.

II. SELECTION OF GRAND JURY FOREMEN

This issue of whether a federal defendant has a right to challenge the selection of the grand jury foreman has never been squarely faced by the Supreme Court. This issue has been addressed by only one Circuit Court. United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982). The Eleventh Circuit Court held that the defendant does have a right to

nondiscriminatory selection of federal grand jury foremen under the 5th Amendment. This result was reached through analogy to 14th Amendment cases which have held that a state defendant has a right to challenge a discriminatory selection of foremen which is co-equal to the right to challenge discriminatory selection of the grand jury members. Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981) per curiam.

The Supreme Court assumed in Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979) that a conviction must be set aside for discrimination in the selection of grand jury foremen in the context of a 14th Amendment challenge to the selection process used in Tennessee. In Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981), the Fifth Circuit accepted

this assumption. However, Rose and Guice are not controlling under the facts of this case.

Both Rose and Guice involved challenges to state selection procedures for grand jury foremen. In the Rose case the foreman was chosen by the judge from the entire population. The foreman was then added to the randomly chosen grand jury as a thirteenth member. In Guice the foreman was selected from the 40 member venire and then the remaining 11 members of the grand jury was selected randomly from the remaining 39 veniremen. Thus, each case presents a situation where discrimination in the selection of the foreman may result in a discriminatorily selected grand jury as a whole. This is not the case in the federal selection of a grand jury foreman. A panel of 23 grand jury members is first

selected in a manner which is not challenged here. From this presumptively fair cross-section cf the population one member is selected by a judge to act as foreman. There is no chance that discrimination in the selection of the foreman would upset the balance of the grand jury by adding a discriminatorily selected member.

The nature of the duties and the power of the grand jury foreman is significantly different in the federal system than under the facts of either Rose or Guice. The Tennessee grand jury foremen challenged in Rose aid the district attorney in investigation criminal activity, may issue subpoenas, and must sign an indictment in order to prevent a fatal defect in the indictment. See Rose v. Mitchell, 443 U.S. at 548 n. 2, 99 S.Ct. at 2996 n. 2; Bird v. State, 103 Tenn. 343, 52 S.W. 1076

(1899). The Louisiana grand jury foremen challenged in Guice are likewise charged with an active role in the pursuit of criminal activities. Guice, supra at 511. On the other hand a federal grand jury foreman merely administers oaths, signs indictments and keeps clerical records. See Rule 6 of the Federal Rules of Criminal Procedure. These are clearly simply ministerial duties. Because I find that the duties of a federal grand jury foreman are not constitutionally significant, I hold that Defendant Donald Lorrin Cronn does not have a right under the 5th Amendment to challenge selection of grand jury foremen as discriminatory.

In conclusion, I find that the position of a federal grand jury foreman is very different from the position of the state grand jury foremen challenged in Rose and

Guice, and thus these cases are not controlling. I further find that the position of a federal grand jury foreman is not constitutionally significant. Therefore, the Defendant in this case has no cause of action under the 5th Amendment to challenge the selection procedure used for federal grand jury foremen. It is accordingly

ORDERED that Defendant Cronn's motion to make available the records of grand jury selection for the purpose of adducing evidence in aid of Defendant's motion to dismiss the indictment based on discriminatory selection of grand jury foreman be and hereby is DENIED in all things.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-1614

D.C. Docket No. CR-3-82-071-F

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD LORRIN CRONN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before CLARK, Chief Judge, GEE and POLITZ, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District

Court in this cause be, and the same is hereby, affirmed.

September 28, 1983

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82 1614

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD LORRIN CRONN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 28, 5 Cir., 1983 _____ F.2d _____)
(October 27, 1983)

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of ths panel nor Judge in regular active service of the Court having requested that the Court be

polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Ban is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

THOMAS GIBBS GEE
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82 1614

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DONALD LORRIN CRONN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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O R D E R:

[ ] The motion of appellant, Donald Lorrin Cronn, for [x] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

[x] The motion of appellant, Donald Lorrin Cronn, for [x] stay [ ] recall and stay of the issuance of the mandate pending peti-

tion for writ of certiorari is GRANTED to and including November 26, 1983, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

[ ] The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____

_____, under the same conditions as set forth in the preceding paragraph.

[ ] The motion of _____ for a further stay of the issuance of the mandate is DENIED.

THOMAS GIBBS GEE
UNITED STATES CIRCUIT JUDGE

selected, I would think that any member thereof would be appropriate as foreman.

MR. McCOLL: Well, that's not exactly the case law -- as I read the cases, Your Honor, I may be wrong, but that's not my interpretation of the case. And I cite specifically United States v. Perez-Hernandez. 672 Federal 2d 1380. And there the Court relied on a Fifth Circuit holding which talked about the --

THE COURT: Is that an Eleventh Circuit case?

MR. McCOLL: Yes, sir. But it relied on a Fifth Circuit case which accepted the rational that we're -- that we're going forward on. It's just simply in the last ten years that there has never been a foreman that -- that -- that repre-

sents -- is representative of a cognizable group in a community --

THE COURT: Well, that's true. But let's let the record reflect that the defendant Cronn is a Caucasian male, is he not?

MR. McCOLL: Yes, sir. But under Peters v. Kiff I don't think that's a problem.

THE COURT: Well, it may not be a problem, but your complaint is that -- and as a matter of fact, the grand jury that indicted him had a female foreman, which you can tell, obviously, from the indictment itself. Is that not correct?